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No. 859

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

VIRGINIA CORDREY,

Appellant,

v.

DR. LEE JAMES CORDREY,

Appellee.

On Appeal from the Supreme Court of Florida

MOTION TO DISMISS

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TABLE OF CONTENTS

	PAGE
Statement	1
Argument	3
Conclusion	11
Appendix	12

INDEX TO CITATIONS

CASES:

Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935)	9
Burlovic v. Farmer, 115 N.E.2d 411 (Ohio App. 1953)	8
Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469 (1947)	9
Converse v. Hamilton, 224 U.S. 243 (1912)	9
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921)	5
Halvey v. Halvey, 330 U.S. 610 (1947)	8
Home Ins. Co. v. Dick, 281 U.S. 397 (1930)	10
John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936)	9
Kingston v. Quimby, 80 So.2d 455 (Fla. 1955)	5
Lowman v. Lowman, 166 Ohio St. 1, 139 N.E.2d 1 (1956)	8
Miller v. Miller, 284 Pa. 414, 131 Atl. 236 (1925)	8
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)	4

STATUTES AND RULES:

Florida Statutes Annotated	
§ 65.15	2, 3
§ 92.031	5
Florida Appellate Rules	
2.1(5)(a)	4, 12
2.1(5)(b)	3, 12

PAGE

Ohio Revised Code
§ 3103.05 7
§ 3103.06 8

MISCELLANEOUS:

Currie, *On the Displacement of the Law of the Forum*, 58 Colum. L. Rev. 964 (1958) 5

Goodrich, *Conflict of Laws* (4th Scoles ed. 1964) 6, 7

Teitelbaum, *The Pennsylvania Divorce Law*, preceding tit. 23, Purdon's Pa. Stat, Ann. (1955) 8

Restatement, *Conflict of Laws* (1934) 6

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STATEMENT

The appellant, Mrs. Virginia Cordrey, and the appellee, Dr. Lee James Cordrey, were married to one another from June 14, 1945, until January 30, 1959, when they were divorced. They had separated in 1956, and on December 4, 1956, they executed a separation agreement by which Dr. Cordrey agreed to pay Mrs. Cordrey one-third of his net income each year. The agreement was not written into the divorce decree, which made no provision for alimony. There are no children.

Dr. Cordrey was living in Cleveland at the time the separation agreement was made, practicing medicine. Mrs. Cordrey lived in Philadelphia. She was a dancing instructor and had remained in Philadelphia after appellee had left

there first to spend a year on the faculty of the Medical School of Duke University in North Carolina and then to practice in Cleveland and thereafter, since 1958, in Tampa, where he now lives. Until the couple separated she had visited her husband on weekends while maintaining her Philadelphia home and job. They had previously lived together in New Jersey for one year, Florida for two years and Georgia for three years.

Dr. Cordrey remarried after the divorce. In 1965 he fell into arrears in his payments pursuant to the separation agreement. He had paid Mrs. Cordrey more than $150,000 before defaulting. Mrs. Cordrey brought suit for specific performance of the agreement, invoking the jurisdiction of the Circuit Court for Hillsborough County (Tampa), Florida. The court ordered Dr. Cordrey to pay the amount that he was in default, which with interest was more than $100,000, and for the future directed him to pay Mrs. Cordrey $1,000 a month until she remarried. The court said that Mrs. Cordrey had admitted that this continuing amount would satisfactorily maintain her.

In thus modifying Dr. Cordrey's obligations, the court took into account the circumstances of Mrs. Cordrey, who had substantial investments and whose earnings as a dancing instructor had been significant, and the fact that it was real or fancied threats of publicity and scandal that led Dr. Cordrey in 1956 to agree to pay his then wife one-third of his net income each year. The court acted under a Florida statute, F.S.A. § 65.15, which authorizes the courts of the state on the request of either party to modify the provisions of any separation agreement because of changed circumstances of the parties.[1]

The judgment of the trial court was affirmed by the District Court of Appeal, which said that there was "over-

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[1] The foregoing paragraphs are based upon the findings and conclusions of the trial court (Jur. St. App. 2-13) and the opinion of the District Court of Appeal (206 So. 2d 234).

whelming evidence of changes in the circumstances of the parties . . . subsequent to the execution of the agreement." (206 So. 2d at 241). Thereafter Mrs. Cordrey attempted to take an appeal to the Florida Supreme Court, but the appeal was dismissed on Dr. Cordrey's motion. The motion was made on the ground that Mrs. Cordrey had pursued the wrong procedure in attempting to bring her case before the Supreme Court.

In none of her pleadings in the trial court did Mrs. Cordrey allege that modification of the agreement pursuant to F.S.A. § 65.15, which was specifically invoked by Dr. Cordrey, would violate any provision of the Federal Constitution. Nor did Mrs. Cordrey in any of her pleadings allege that the law of any other state than Florida should control or the content of any such sister-state law.

ARGUMENT

I

The only question presented in this case is a question of state law: whether the Supreme Court of Florida correctly read and applied the provisions of the Florida Appellate Rules that govern its jurisdiction and the procedure for invoking its jurisdiction.

Rule 2.1(5)(b) provides that appeals to the Supreme Court from the district courts of appeal may be taken as a matter of right "only from decisions initially passing upon the validity of a state statute . . . or initially construing a controlling provision of the Florida or federal Constitution." By the same rule, the Florida Supreme Court may review by certiorari certain other decisions of the courts of appeal.

Dr. Cordrey's motion to dismiss Mrs. Cordrey's appeal alleged that the Supreme Court did not have jurisdiction on appeal under Rule 2.1(5)(b), that review could be had only on certiorari and that no constitutional question was involved. Certainly on the face of the opinion of the District Court of Appeal no question of the validity of any

state statute or other constitutional question was decided. Thus, even if it were open to question here, the decision of the Florida Supreme Court to grant appellee's motion to dismiss was clearly right. Moreover, on appellant's view that she raised federal constitutional claims that were denied by the Florida courts sub silentio she mistook her appellate remedies and properly suffered dismissal of her appeal. If she were right, the constitutional question was not "initially" decided by the District Court of Appeal but by the trial court, where she claims first to have raised the constitutional issues, and according to another provision of the Appellate Rules, Rule 2.1(5)(a), her appeal from the trial court lay to the Supreme Court and not the District Court of Appeal.[2]

In no event is the case properly here, and the appeal to this Court should be dismissed for want of jurisdiction.

II

The fact is that appellant did not adequately state any federal constitutional claim in the trial court or even allege the sister-state law underlying any such claim.

A

By her own account (Jur. St. 9-14), appellant mentioned the federal constitution a few times in briefs but never in a pleading or other document of record or in any other way that would squarely pose the issue so as to require the Florida courts in deciding against her necessarily to deny a constitutional claim. These passing mentions constitute neither an adequate nor a timely insistence on federal constitutional rights. This is not a case in which "the record as a whole shows either expressly or by clear intendment" that a federal constitutional claim was "brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

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[2] Florida Appellate Rule 2.1(5)(a) and (b) is set out as an appendix to this motion (pp. 12-13, *infra*).

Moreover, although this is a minor point given the numerous other jurisdictional and substantive infirmities of appellant's case, if she made any constitutional claim at all, again by her own account it was not a claim that a Florida statute was unconstitutional in its application to her even within the liberal doctrine of *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). Thus, the case clearly would not be properly here on appeal even if it were properly here at all, which it is not.

B

Not only did appellant fail to insist on her alleged federal constitutional rights in an adequate way but she did not properly place before the Florida courts the premise for her federal claim—the status and provisions of the sister-state law that she says should have been applied.

Florida has adopted the Uniform Judicial Notice of Foreign Law Act, F.S.A. § 92.031.

> "However, the Act does not operate automatically in every case. On the contrary a party intending to take advantage of its provisions by asking that judicial notice be taken of a foreign law has the obligation to give reasonable notice of that intention to the adverse parties, either in the pleadings or otherwise." *Kingston v. Quimby*, 80 So. 2d 455, 456 (Fla. 1955).

This view, which is the customary interpretation of the Uniform Act, see *id.* at 457, comports with elementary fairness and sound judicial administration. A party should not be entitled to claim the applicability of a sister-state's law if the party has not established, first, that the sister-state's law should apply and, second, what the content of that law is. Therefore, "when the foreign law is not made to appear in timely and appropriate fashion by the interested party, the court will apply the law of the forum." Currie, *On the Displacement of the Law of the Forum*, 58 Colum. L. Rev. 964, 1027 (1958).

Appellant failed to meet this elementary requirement. In her complaint no mention was made of Ohio law or of the law of any other state. She did move orally to amend her complaint, if necessary, to allege specifically any foreign law she might claim was involved in the case, and the trial court granted the motion (Jur. St. App. 2). Still no allegation of Ohio law was forthcoming. Thus, it was a rule of pleading and practice—and one which has widespread acceptance—that defeated the application of Ohio law to this controversy. It is of course a customary rule that on matters of pleading and practice the law of the forum applies. *E.g.*, Restatement, *Conflict of Laws* §§ 592, 595 (1934). This raises no question warranting consideration by the Court.

III

Even if it were assumed that the law of a state other than Florida should have been applied, appellant has not established that Ohio's law should control.

The law that ordinarily governs matters relating to the performance of a contract is that of the state most substantially related to the contract. Goodrich, *Conflict of Laws* § 114 (4th Scoles ed. 1964). Traditionally this meant (and often still does) the state where the contract is to be performed. Restatement, *Conflict of Laws* § 358 (1934).

Several states have contacts with the separation agreement involved in this case. Ohio is certainly one: The contract was executed there, and Dr. Cordrey lived there at the time of execution. Pennsylvania is certainly another: Mrs. Cordrey had lived there, apart from her husband except on weekends, for two years or so before the separation agreement was entered into,[3] she has continued to live

[3]Whether her "domicile" was in Pennsylvania or was in Ohio, where her husband was then living, is not an easy question, though the modern view would favor the former choice, Goodrich, *supra* § 36. The fact that she lived in Pennsylvania is unquestioned, however.

there since the separation agreement, she rents an apartment, owns another home and owns an apartment building and a shoe repair shop there, and it was there that she obtained a divorce from the husband in 1959.[4] North Carolina also has contacts with the agreement: That is the state of Mrs. Cordrey's origin, the state where she lived, caring for her invalid father, at the time of the trial court's decision in this case and the state where she owned a small grocery store.[5]

It bears noting that the parties, despite the fact that they lived in different states when the agreement was executed, did not stipulate that Ohio's law should apply, a choice of law that all courts would give effect to, Goodrich, *supra* § 107.

Choosing the law applicable to the performance of a separation agreement can be a complex and difficult question. It is not, however, a federal question.

IV

If Ohio law were assumed to be controlling, and if appellant's failure to plead and prove it were ignored, there would still remain a serious question whether the application of Ohio law would have produced a different result.[6]

The Ohio statutes relied upon by appellant do not appear germane to the question that was before the trial court. One statute, Section 3103.05 of the Ohio Revised Code, seems merely to remove the common-law disability of spouses to contract with one another:

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[4]The Jurisdictional Statement, p. 15, refers to Pennsylvania as the state "where the contract is [usually] to be performed."

[5]Of course Florida, the residence of the husband-obligor Dr. Cordrey, also has substantial contacts with the agreement.

[6]How the courts of New York would have decided this case if the agreement had been incorporated in a Nevada decree (Jur. St. 16) is of no conceivable pertinence to this issue.

> "A husband or wife may enter into any engagement or transaction with the other . . . which either might if unmarried . . . ."

The other, Section 3103.06, expressly authorizes separation agreements as an exception to the general rule that a husband and a wife may not by contract alter their legal relations with one another.

Appellant cites two Ohio cases construing these statutes. The first, *Burlovic v. Farmer*, 115 N.E.2d 411 (Ohio App. 1953), holds that a husband and wife may enter into a valid separation agreement notwithstanding that the wife is, at the time the agreement is made, an infant. The case is of no conceivable relevance. The other case cited is *Lowman v. Lowman*, 166 Ohio St. 1, 139 N.E.2d 1 (1956). The agreement involved there was a complete mutual release by the husband and the wife of all rights of support, dower, inheritance, etc. The wife sued to have the agreement annulled. The Supreme Court of Ohio held that she had not shown any basis for annullment. The court most assuredly did not hold that a separation agreement that is not a mutual release but instead provides for continuing performance can never be modified by a court.[7]

Thus, the uncertainty over whether the result in this case would have been different if the Florida courts had applied Ohio law makes this case a wholly inappropriate vehicle for resolution of the constitutional claims put forward by appellant. *Cf. Halvey v. Halvey*, 330 U.S. 610, 618-19 (1947) (Frankfurter, J., concurring).

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[7]It might be noted that the Pennsylvania courts also have not said that a court may never modify a separation agreement which provides for continuing payments by the husband no matter how circumstances have changed. In Miller v. Miller, 284 Pa. 414, 418, 131 Atl. 236, 238 (1925), the Supreme Court of Pennsylvania said that "if legally made, *and apparently fair and reasonable*," a separation agreement will be enforced. (Emphasis added.) Under Pennsylvania law there is no alimony after an absolute divorce. Teitelbaum, *The Pennsylvania Divorce Law*, preceding tit. 23, Purdon's Pa. Stat. Ann. (1955).

V.

Should the appeal overcome all of the obstacles stated in the preceding sections of this motion, it should nevertheless be dismissed because the federal questions it purports to present are so unsubstantial as not to deserve plenary consideration by this Court.

A

The alleged constitutional question most strenuously pressed by appellant is based upon the full faith and credit clause.

It is axiomatic that "*prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted." *Aslaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935). A state violates the full faith and credit clause where it applies its own law to a contract only where "there was no occurrence, nothing done, to which the law of . . . [the forum] could apply."[8] *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936); *cf. Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 476 (1947).

Here the Florida courts have applied a Florida statute—which avowedly is "declaratory of existing public policy and laws" of Florida and which courts are enjoined "to construe liberally"—to a controversy between a long-time Floridian and a resident of another state who had invoked the jurisdiction of the Florida courts. There is no doubt that Florida has a legitimate interest in protecting one of its residents against the unconscionable result of a bargain he made under circumstances that have vastly changed and under a kind of duress.

There can be no substantial claim, therefore, that what Florida has done violates the full faith and credit clause.

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[8] Except in cases like Converse v. Hamilton, 224 U.S. 243 (1912), where a state has been required to apply the law of the incorporating state to determine matters of statutory assessment against shareholders of an insolvent corporation.

B

What has just been said also disposes of the only other constitutional claim appellant apparently mentioned in the state court of appeal, *i.e.*, that the judgment below violates the due process clause. (Jur. St. 13-14).[9]

The leading case is *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). There the Court held that a Texas statute that prohibited contractual provisions limiting the time to sue to any period less than two years after breach violated due process when it was applied by Texas courts in a suit on a fire insurance policy against foreign insurers; the reason was that Texas had no connection whatever with the matter save for the fact that suit had been brought in the Texas courts by the party invoking the Texas statute.

Here, of course, it is appellant, the wife, who has invoked the Florida laws and the Florida courts. Here the fact of appellee's residence being in Florida was of considerable significance. It is altogether appropriate for the Florida courts to require, as a condition of judicial enforcement against a Floridian of obligations claimed to have been assumed under a separation agreement, that the reasonableness of the terms of the agreement be subjected to review in light of changed circumstances.

As the Court said in *Dick*,

> "Doubtless, a State may prohibit the enjoyment by persons within its borders of rights acquired elsewhere which violate its laws or public policy; and, under some circumstances, it may refuse to aid in the enforcement of such rights." 281 U.S. at 410

Here Florida has done much less than what it may constitutionally do. Its actions do not take anyone's property without due process of law.

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[9] Appellant invokes the contract clause here but does not even claim to have mentioned it below.

CONCLUSION

The appeal should be dismissed.

Respectfully submitted,

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APPENDIX

Florida Appellate Rule 2.1

* * *

(5) Jurisdiction of the Supreme Court.

(a) Appeals from trial courts may be taken directly to the Supreme Court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees passing directly upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal Constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The Supreme Court may directly review interlocutory orders or decrees passing upon chancery matters which upon final decree would be directly appealable to the Supreme Court. In all direct appeals and interlocutory appeals, the Supreme Court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

(b) Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon the validity of a state statute, a federal statute or treaty, or initially construing a controlling provision of the Florida or federal Constitution. The Supreme Court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, and may issue writs of certiorari to commissions established by law.

The Supreme Court may issue writs of mandamus and quo warranto when a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other

agency is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to trial courts when questions are involved upon which a direct appeal to the Supreme Court is allowed as a matter of right.